Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

CHARLES L. RYAN, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS,

Petitioner,

VS.

LAURENCE K. LIBBERTON,

Respondent.

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE
QUESTIONS PRESENTED

The state trial judge who presided over Laurence Libberton's trial and who sentenced Libberton to death also presided over Libberton's post-conviction proceedings. In Libberton's third post-conviction proceeding, the judge rejected a claim that defense counsel was ineffective at sentencing by failing to produce more evidence that Libberton was a "follower" and that he had a difficult relationship with his father. The court ruled: "Having presided at the trial of this case, this court is of the opinion that nothing defendant has raised in his current petition for post-conviction relief would have affected the outcome of the trial or the sentencing. . . . The defendant received nothing but effective assistance of three very experienced and qualified criminal attorneys."

1. Did the Ninth Circuit err by finding on federal collateral review that the state court's ruling regarding ineffective assistance of counsel at sentencing was "unreasoned" and by thereafter failing to reference the AEDPA deference standard in analyzing whether Libberton was prejudiced by counsel's alleged deficiencies, even though the state court ruling tracks the analysis this Court requires under *Strickland*?

2. Did the Ninth Circuit err by granting habeas corpus relief on Libberton's ineffective assistance of counsel claim based on evidence that Libberton was a "follower" and had an abusive relationship with his father, when this evidence was essentially cumulative to what was presented at sentencing, and the post-conviction judge expressly found that this type of evidence would not have changed the sentencing decision?

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OPINION BELOW

The Ninth Circuit's opinion is reported as *Libberton v. Ryan*, 583 F.3d 1147 (9th Cir. 2009). (Pet. App. A.) The district court's denial of Libberton's petition for writ of habeas corpus is reported as *Libberton v. Schriro*, 2007 WL 2746649 (D. Ariz.) (unpublished). (Pet. App. B.) The district court's order denying Libberton's motion to alter or amend the judgment is reported as *Libberton v. Schriro*, 2007 WL 3101841 (D. Ariz.) (unpublished). (Pet. App. C.)

STATEMENT OF JURISDICTION

The Arizona Supreme Court affirmed Libberton's death sentence on direct appeal. *State v. Libberton*, 685 P.2d 1284 (Ariz. 1984) (Pet. App. D.) The state trial court denied the relevant petition for post-conviction relief on February 10, 1988, as well as a subsequently filed petition for post-conviction relief on November 21, 1996. (Pet. App. E & F.) The United States District Court denied Libberton's amended petition for writ of habeas corpus on the merits on September 18, 2007. (Pet. App. B.) The United States District Court also denied Libberton's motion to alter or amend the judgment on October 22, 2007. (Pet. App. C.) The Ninth Circuit reversed the district court's judgment with respect to sentencing and remanded the case on October 2, 2009. (Pet. App. A.) The Ninth Circuit denied Petitioner's requests for rehearing and rehearing en banc on January 5, 2010. (Pet. App. G.) This petition for writ of certiorari is timely filed within 90 days of that decision. This Court has jurisdiction pursuant to United States Constitution Article III, Section 2 and 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Section 2224 of Title 28 of the United States Code, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), reads, in relevant part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim – [¶] (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or [¶] (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.
>
> (e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence. [¶] (2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that – [¶] (A) the claim relies on – [¶] (i) a new rule of constitutional law, made retroactive to cases on

> collateral review by the Supreme Court, that was previously unavailable; or [¶] (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and [¶] (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

STATEMENT OF THE CASE

This AEDPA case involves the reasonableness of the Arizona courts' rejection of Libberton's post-conviction claim that his counsel was ineffective at sentencing for failing to present additional evidence in mitigation that (1) he was a "follower" and thus less culpable than a co-defendant and (2) he had a difficult relationship with his father. Although the Arizona courts at sentencing and on post-conviction review considered - and found insufficient to warrant leniency - evidence that Libberton was a "follower" and had a difficult relationship with his father, the Ninth Circuit nevertheless granted federal habeas relief on the basis that evidence of that nature would have changed the sentencing decision.

The facts underlying Libberton's convictions and death sentence are set forth in the Arizona Supreme Court's ruling on direct review:

> In the early morning hours of November 17, 1981, the victim, Juan Maya, picked up a hitchhiker, Martin Norton. Norton, a 14-year-old, lived with a friend, Steven James, in a mobile home trailer located in Phoenix. Maya

drove to the trailer and, according to Norton, made homosexual advances. Norton resisted and told Maya he should go in the trailer because there was a homosexual there who could satisfy Maya's desires. Maya entered the trailer, which was occupied at the time by James and the appellant, Libberton. Norton told James that Maya was gay and to get rid of him. James then kicked Maya in the crotch, and Maya left the trailer and ran. James and [Libberton] pursued Maya and brought him back to the trailer. Norton testified that Maya's nose and mouth were bleeding when he was brought back to the trailer.

Once again in the trailer, Norton, James, and [Libberton] took turns hitting Maya in the face. Maya pleaded with them to take his car and credit cards and quit hitting him. James had a gun in his hand and took Maya's wallet. From the wallet, [Libberton] obtained the title to Maya's car, and forced Maya to sign the title over to [Libberton]. James took Maya's bracelet and ring. [Libberton] put on Maya's belt, which had Maya's name engraved on the back, and said, "[n]ow that I own Juan Maya's car I might as well be Juan Maya."

The three assailants then discussed, in Maya's presence, what to do with Maya. James said "[t]he only thing we can do is kill him." [Libberton] agreed. Next, James suggested the three could hide the body in a mine shaft on his parents' property in Salome. [Libberton] agreed, and at gunpoint forced Maya into Maya's car.

[Libberton] kept the gun pointed at Maya all the way to Salome, approximately a two-hour drive from the trailer. On the way, James bought gas and cigarettes with one of Maya's credit cards. Later, along the highway to Salome, a police officer stopped the car for speeding. James, the driver, got out of the car and talked with the officer. [Libberton] threatened to shoot Maya if he said anything. James got back in the car and the group proceeded to Salome.

The group arrived at James' parents' property shortly before daybreak. [Libberton] handed the gun to James who ordered Maya to walk up the side of a small mountain to the mine shaft. Maya requested and was allowed to smoke a cigarette. The assailants stood by Maya, allowing him to finish his cigarette, before beginning the final assault. When Maya finished his cigarette, James ordered Maya to step to the shaft, a hole about five feet in diameter with a beam across the top. Maya screamed "[d]on't kill me." James fired at Maya twice from less than five feet. (Only sparks and no bullets came out of the gun because, as established at trial, the gun was filled with debris.) Maya ran at James, grabbed the gun, struggled with James, and fell to the ground. [Libberton] grabbed a five-pound rock and began beating Maya on the back of the head and shoulders with it. Maya was still struggling with James for the gun. Norton handed [Libberton] a board, with which [Libberton] struck Maya on the back, forcing Maya to let go of the gun. James then shot in the direction of Maya's head.

> As before, only sparks came out of the gun. Maya was still conscious, making "gurgling sounds," and moaning. [Libberton] grabbed the gun from James and fired it at Maya's head. Again, the gun malfunctioned. Maya was still not dead, so all three assailants picked up large rocks and slammed them on the back of Maya's head as Maya lay face down. After about five blows Maya lay unconscious. [Libberton] and James dragged Maya to the mine shaft and threw him in.
>
> Back in the car [Libberton] and James told Norton that if he told anyone they would kill him. The three then returned to Phoenix. James told Norton to clean the trailer and remove Maya's blood from the couch. That morning [Libberton] and James picked up David McIntosh in Maya's car. The three assailants and McIntosh drove around. [Libberton] bought some shoes with one of Maya's credit cards. At noon the three assailants were captured when [Libberton] attempted to get a cash advance of $20 on Maya's MasterCard

(Pet. App. D, *Libberton*, 685 P.2d at 1287-88.)

Following a jury trial, Libberton was convicted of first-degree murder, aggravated robbery, kidnapping, and theft. The trial court held a sentencing hearing during which the court heard testimony from witnesses on behalf of the defense and the State. The court also considered two psychological reports prepared in advance of the hearing, as well as a presentence report.

The mitigation proffered by Libberton included evidence that he was a "follower" and that he had a difficult relationship with his father, who had filed criminal charges against him for breaking into his business and taking money Libberton believed was owed to him. Libberton presented reports from two experts who examined him and who concluded that Libberton acted impulsively and "got carried away with what's happening at the time." Libberton also presented two witnesses who testified about Libberton's "love-hate" relationship with his father and how his father would "knock the pins out from under him" every time he tried to move forward. (Pet. App. B, at 134-36.) Those witnesses described Libberton as a "follower [who] would get into something and then he would just follow it through, go along with the crowd." Furthermore, Libberton's counsel emphasized in argument that Libberton "appeared to be a follower rather than the instigator" and that Libberton followed the more culpable James "like the blind sheep [Libberton] is."

The trial court found two aggravating circumstances: the murder was committed in expectation of pecuniary gain, A.R.S. § 13–703(F)(5); and the murder was committed in an especially heinous, cruel or depraved manner, A.R.S. § 13–703(F)(6). The court found no mitigating circumstances sufficiently substantial to call for leniency, and sentenced Libberton to death. *Libberton*, 685 P.2d at 1291–92. The Arizona Supreme Court affirmed that ruling after independently reviewing aggravating and mitigating circumstances. *Id.*

Addressing Libberton's proffered mitigation evidence, including that he was a "follower" and had a difficult relationship with his father, the Arizona Supreme Court stated:

> In response, we first note that from the beginning, [Libberton] actively participated in

> the crime, and even pointed the gun at Maya on the way to Salome. Second, there is no evidence that [Libberton's] ability to appreciate the wrongfulness of his acts was substantially impaired. Third, the sentencing court specifically found that [Libberton's] age was not a mitigating factor. Considering the deliberation involved in the crime, and the duration of the crime, we agree that [Libberton's] age is not a sufficient factor to call for leniency. *See* [*State v.*] *Gillies*, *supra*, 135 Ariz. [500], 513, 662 P.2d [1007], 1020 [(1983)]. Finally, we agree with the trial court that all of [Libberton's] claimed mitigating circumstances, considered as a whole, are not sufficiently substantial to call for leniency.

Id. at 1292.

Libberton initiated state post-conviction proceedings in 1984. *Libberton*, 583 F.3d at 1158. In his first petition for post-conviction relief, Libberton alleged ineffective assistance of counsel "at every critical stage of the proceeding." *Id.* The state post-conviction court summarily denied Libberton's petition, as well as a subsequently filed petition. *Id.*

In December 1986, Libberton filed his initial federal habeas petition, alleging ineffective assistance of counsel at both the guilt and penalty phases of his trial. *Id.* On June 30, 1987, federal proceedings were stayed to allow Libberton to return to state court to exhaust some of his claims. *Id.*

On September 14, 1987, Libberton filed a successive (third) petition for post-conviction relief, raising the ineffective assistance of counsel claim that is the subject of the Ninth

Circuit's ruling below. Libberton alleged that there was newly discovered evidence relating to his claims of ineffective assistance of counsel, including an affidavit from one of the mental health experts who examined Libberton prior to trial and who stated that Libberton has a "general tendency" to react implusively and reflexively and that Libberton was simply "go[ing] along" in Maya's murder. Libberton also presented affidavits from his mother and sister, who similarly asserted that Libberton was a "follower" who would not have done such a thing on his own and that he "was easily influenced by others" and "would do anything to [be] accepted by others."

On February 10, 1988, the state post-conviction judge, who had presided over Libberton's trial and imposed the death sentence, rejected Libberton's ineffective assistance of counsel claim. *Id.* In denying Libberton's post-conviction petition, the judge wrote:

> Having presided at the trial of this case, this court is of the opinion that nothing defendant has raised in his current petition for post-conviction relief would have affected the outcome of the trial or the sentencing.
>
> This court is further of the opinion that the defendant received nothing but effective assistance of three very experienced and qualified criminal attorneys;
>
> The court finds that the defendant has failed to raise any colorable claim whatsoever;
>
> The court determines that no material issue of fact or law exists which would entitle the defendant to relief under Rule 32 and that no

> purpose would be served by any further proceedings.
>
> IT IS THEREFORE ORDERED dismissing the Petition for Post-Conviction Relief.

(Pet. App. E, at 1-2.)

On September 30, 1991, Libberton filed a second amended habeas petition. *Libberton*, 583 F.3d at 1158. In connection with that petition, the district court permitted Libberton to depose George Lim (Libberton's trial and sentencing attorney); Daniel McIntosh (an acquaintance of both Libberton and James); and Harry Dean (an officer who previously guarded Libberton). *Id.* Pursuant to a stipulation, the district court then dismissed the habeas petition to allow Libberton to return to state court to exhaust additional claims. *Id.* at 1158–59.

On September 12, 1994, Libberton filed a fourth petition for post-conviction relief in state court. *Id.* at 1159. As part of the state post-conviction proceedings, Libberton proffered a 1991 affidavit from Norton, describing Libberton's and James' respective roles as follower and leader in Maya's murder. *Id.* at 1159–60. On November 21, 1996, the state post-conviction court denied Libberton's fourth petition, refusing to consider Norton's affidavit because it "raises grounds that have been precluded" by Libberton's prior petitions and the information contained in the affidavit could have been "discovered through the exercise of due diligence before the prior three petitions for [p]ost-[c]onviction [r]elief were filed. . . . The affidavit now presented could have been prepared in 1982, or at any time thereafter." *Id.* at 1160. On June 24, 1997, the Arizona Supreme Court denied Libberton's petition for review. *Id.*

Libberton returned to federal court, filing a habeas petition on September 9, 1997, and an amended habeas petition on February 17, 1998. *Id.* Libberton sought, but was denied, expansion of the record and an evidentiary hearing on his claim of ineffective assistance of counsel at sentencing. *Id.* On September 18, 2007, the district court denied Libberton habeas relief, concluding that Libberton failed to establish ineffective assistance of counsel or resulting prejudice. *Id.*

On appeal, the Ninth Circuit initially expanded the record to include the Lim deposition transcript and affidavits of Norton and McIntosh, although the panel subsequently declined to rely on Norton's affidavit. *Id.* at 1165–66, 1172. After partially "rel[ying] on the evidence not presented to the state court and excluded by the district court," the Ninth Circuit determined that "the state court's order denying [Libberton's] IAC claims was unreasoned." *Id.* at 1166. The Ninth Circuit then concluded that "Lim's performance at Libberton's sentencing hearing was deficient, and that Lim's failure to find and present evidence "that would have showed James' greater culpability in Maya's murder, would have showed Libberton's abusive childhood, and would have contradicted the very damaging evidence supplied by Libberton's father [in the presentence report]" was prejudicial.[1] *Id.* at 1168, 1173. As a result, the Ninth Circuit determined that "Lim's failures create a reasonable probability that, had the above-described evidence been presented to the sentencing judge, he would have imposed

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[1] Libberton's father told the pre-sentence report writer that he believed that Libberton did not deserve death and that Libberton could thrive in prison and rehabilitate himself. Libberton's father also stated that although he believed the killing of Maya was out of character, he also had no doubt Libberton was involved and "may have been the leader in planning the crime." (Pet. App. B, at 132.)

a lesser sentence." *Id.* at 1173. The State subsequently filed a petition for rehearing and rehearing en banc, which the Ninth Circuit denied.

Although there is not a panel or en banc dissent in this case, Chief Judge Alex Kozinski, in authoring a dissenting opinion in *Pinholster v. Woodford*, 590 F.3d 651, 685 (2009), specifically referenced the instant case, together with several others, as examples of "a series of mistakes that have, unfortunately, become far too common in our circuit." Noting the Ninth Circuit's reliance on evidence never presented to the state courts and "perhaps worst of all" a failure to afford deference to state court rulings, Chief Judge Kozinski stated:

> I had hoped that our en banc court would sweep away these mistakes and bring our caselaw into conformity with AEDPA. Instead, the majority repeats and magnifies the errors in these prior cases so that they will be very difficult, probably impossible, for us to correct. This perpetuates a habeas regime where few death sentences are safe from federal judges who know ever so much better than those ignorant state judges and lawyers how capital trials ought to be conducted. Because I don't believe we are the ultimate font of wisdom on such matters, I must dissent.

Id.

REASONS FOR GRANTING THE WRIT

I

THE NINTH CIRCUIT'S MISCHARACTERIZATION OF THE STATE COURT RULING AS "UNREASONED" IMPROPERLY VITIATES THE CORNERSTONE AEDPA REFORM THAT REQUIRES DEFERENCE TO STATE-COURT RULINGS.

Because Libberton filed his petition for writ of habeas corpus after April 24, 1996, the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA") applies. *See Lindh v. Murphy*, 521 U.S. 320, 327 (1997). AEDPA "modified a federal habeas court's role in reviewing state prisoner applications in order to prevent federal habeas 'retrials' and to ensure that state-court convictions are given effect to the extent possible under the law." *Williams v. Taylor*, 529 U.S. 362, 403–04 (2002).

Under AEDPA, a state prisoner is not entitled to federal habeas relief with respect to any federal claim that was adjudicated on the merits in state court proceedings unless the state court adjudication (1) was contrary to, or involved an unreasonable application of, clearly established Federal law as determined by this Court adjudication of the claim, or to (2) resulted in a decision that that was based on an unreasonable determination of the facts in light of the evidence presented in state court. 28 U.S.C. § 2254(d); *see also Mitchell v. Esparza*, 540 U.S. 12, 15 (2003). Factual determinations made by the state court are presumed correct and will not be set aside absent clear and convincing evidence to the contrary. 28 U.S.C. § 2254(e)(1).

AEDPA creates a "highly deferential standard for evaluating state court rulings." *Lindh*, 521 U.S. at 334, n. 7. The federal court's opinion of the merits of the claim in the federal petition is not the question. *Woodford v. Visciotti*, 537 U.S. 19, 24-25 (2007); *Yarborough v. Alvarado*, 541 U.S. 542, 665 (2002). Rather, "the only question that matters" under Section 2254(d) is whether the state court ruling was at least "reasonable" under this Court's clearly-established law. *Lockyer v. Andrade*, 538 U.S. 63, 71 (2003).

The Ninth Circuit acknowledged AEDPA's applicability to this case, *see Libberton*, 583 F.3d at 1162, but nevertheless failed to apply the required deferential standard of review – particularly in its analysis of whether Libberton was prejudiced by counsel's alleged deficiencies - apparently because of its assessment that the state post-conviction court's ruling denying relief on Libberton's ineffective assistance of counsel claim was "unreasoned." *Id.* at 1161, 1166.

The state post-conviction court's ruling was not unreasoned and in fact was entirely consistent with this Court's jurisprudence relating to claims of ineffective assistance of counsel. Under *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984), to merit relief, a petitioner must show that (1) counsel's performance was deficient under prevailing professional standards, and (2) the petitioner suffered prejudice as a result. A court is not required to address both components of the *Strickland* test in deciding an ineffective assistance of counsel claim if the petitioner makes an insufficient showing on one. *Id.* at 697.

Here, the state court judge who sentenced Libberton addressed both prongs of the *Strickland* analysis and most importantly, found – based on his review of the pleadings and affidavits submitted in the post-conviction proceeding and

based on his knowledge of the case from having presided over the trial and sentencing – that additional evidence that Libberton was a "follower" and had a bad childhood would not have changed the sentencing decision. Thus, the state court ruling was "reasoned" under *Strickland*.

The Ninth Circuit's finding that the state court decision was "unreasoned" ignores the state court's proper application of the prejudice analysis required under *Strickland*. The Ninth Circuit's finding also ignores that there is no requirement that a state court cite to controlling authority from this Court, so long as the state court's ruling is consistent with this Court's jurisprudence. *Early v. Packer*, 537 U.S. 3, 8 (2002); *Mitchell v. Esparza*, 540 U.S. 12, 16 (2003) (citation to federal law is not required and "a state court need not even be aware of [Supreme Court] precedents, 'so long as neither the reasoning nor the result of the state-court decision contradicts them.'") (citing *Early*, 537 U.S. at 8).

Because the state court properly applied *Strickland*, AEDPA deference applies, and the Ninth Circuit erred by failing to even reference the deference standard in its analysis of the prejudice prong of the *Strickland* analysis. *See Libberton*, 583 F.3d at 1169-73.

II

THE NINTH CIRCUIT'S RULING GRANTING HABEAS CORPUS RELIEF ON LIBBERTON'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM EVISCERATES THE PREJUDICE PRONG OF THE *STRICKLAND* ANALYSIS AND FAILS TO APPLY THE DEFERENTIAL STANDARD REQUIRED BY AEDPA.

Under AEDPA review, in evaluating the state court decision, federal courts must refrain from mischaracterization of the state court opinion or record, and must defer to the presumption that state courts know and follow the law. *See, e.g., Bell*, 543 U.S. at 455 ("We do not think that a federal court can presume so lightly that a state court failed to apply its own law. As we have said before, § 2254(d) dictates a 'highly deferential standard for evaluating state-court rulings,' which demands that state-court decisions be given the benefit of the doubt. . . . Federal courts are not free to presume that a state court did not comply with constitutional dictates on the basis of nothing more than a lack of citation.") (citations omitted).

Clearly established law governing ineffective assistance of counsel claims is the two-prong test (deficient performance and prejudice) set forth in *Strickland*. Furthermore, to merit relief, a petitioner must show that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686.

Under *Strickland*, a petitioner demonstrates deficient performance by showing "that counsel's representation fell

below an objective standard of reasonableness." 466 U.S. at 699. A petitioner's allegations and supporting evidence must withstand this Court's "highly deferential" scrutiny of counsel's performance, and overcome its "strong presumption" that counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* at 689–90.

Even when a petitioner establishes that counsel has performed deficiently, he must still show prejudice to be entitled to relief. To prove prejudice, a petitioner must show a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694; *see also Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993) (prejudice prong concerned with whether "counsel's deficient performance render[ed] the result of the trial unreliable or the proceeding fundamentally unfair"). Prejudice is not presumed; rather, a petitioner must affirmatively prove actual prejudice. *Strickland*, 466 U.S. at 693.

In reviewing a state court's resolution of an ineffective assistance of counsel claim, the federal courts consider *only* whether the state court applied *Strickland* unreasonably, and must apply a "doubly deferential" standard of review:

> The question is not whether a federal court believes the state court's determination under the *Strickland* standard was incorrect but whether that determination was unreasonable—a substantially higher threshold. And, because the *Strickland* standard is a general standard, a state court has even more latitude to reasonably determine that a defendant has not satisfied that standard.

Knowles v. Mirzayance, 129 S. Ct. 1411, 1420 (2009) (quotations and citations omitted); *see also Visciotti*, 537 U.S. at 24–25 ("Under § 2254(d)'s 'unreasonable application' clause, a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the state-court decision applied *Strickland* incorrectly. Rather, it is the habeas applicant's burden to show that the state court applied *Strickland* to the facts of his case in an objectively unreasonable manner.") (citations omitted).

A. *The Ninth Circuit Failed to Properly Defer to the State Court's Analysis of Libberton's Post-Conviction Claim.*

The Ninth Circuit granted habeas relief based on Libberton's claim that his counsel should have developed evidence that Libberton was a "follower" and had an abusive relationship with his father. The Ninth Circuit's analysis is flawed, however, because it myopically focuses on whether additional mitigation evidence could have been presented at sentencing, rather than on the reasonableness of the state court's ruling denying Libberton's ineffective assistance of counsel claim.

The fact that additional information could have been presented at sentencing is not dispositive of an ineffective assistance of counsel claim. The proper analysis of such a claim focuses only on whether *new information alleged during state court consideration of the claim* would have changed the outcome of the sentencing decision.

In the instant case, the Ninth Circuit not only failed to focus on the post-conviction ruling, it also failed to accurately portray what was presented at sentencing. Counsel in fact

presented evidence that Libberton was a "follower" and had a difficult relationship with his father, which is the very type of information the Ninth Circuit held should have been presented. Because this type of information had been presented at sentencing, the post-conviction court's ruling denying relief on Libberton's ineffective assistance claim is neither surprising nor unreasonable.

Prior to sentencing, the trial court authorized mental health examinations by two experts, Drs. Bindelgas and Dee. (Pet. App. B, at 82-83.) Dr. Bindelglas concluded that Libberton's "judgemental [sic] functioning is markedly impaired and he has impulsive tendencies. He also has depressive paranoid features." (*Id.*) Dr. Bindelglas opined that Libberton did not act with premeditation in murdering Maya because "[h]e is much too impulsive for that." (*Id.*) Similarly, Dr. Dee explained that Libberton had defective judgmental function, impulsivity and flattening affect, and immaturity and poor social adjustment. (*Id.*) Dr. Dee opined that "[i]t is not likely that [Libberton] planned any of his misadventures but is more apt to have responded impulsively and got carried away with what's happening at the time." (*Id.*)

At the mitigation hearing, Libberton's counsel called two witnesses – Nancy Henry and Geraldine Smith. (*Id.* at 86.) Henry testified that Libberton was not a violent person, contending that if Libberton was involved in Maya's murder, he could not have acted on his own. (*Id.*) Henry also described Libberton as a "follower [who] would get into something and then he would just follow it through, go along with the crowd." *Id.* Like Henry, Smith testified that Libberton was a follower who would not have acted on his own. (*Id.*)

Prior to the sentencing court's imposition of the death penalty, defense counsel emphasized, as mitigation, that

Libberton "appeared to be a follower rather than the instigator and that Mr. James apparently wanted [Maya] killed." Defense counsel contended that Libberton "went along with Mr. James . . . he was a follower at all times involved in the killing. The initial steps were taken by James and the only thing [Libberton] did was just follow along like a blind sheep that he is . . . ." *Id.* Nevertheless, after considering this evidence that James may have had a greater role in Maya's murder while Libberton was a "follower," the trial judge sentenced Libberton to death.

With that background, the post-conviction court considered Libberton's post-trial claim of ineffective assistance of counsel. In his post-conviction pleadings, Libberton presented additional evidence of James' role as leader and Libberton's role as follower in murdering Maya. Specifically, Libberton proffered a 1987 affidavit from Dr. Dee, who opined that Libberton's "youth and consequent immaturity . . . was a factor in this killing," and that Libberton was simply "go[ing] along" in Maya's murder. (Pet. App. B at *43.)

Libberton also presented affidavits from his mother, his sister and a childhood friend. Libberton's mother described him as a "follower," who wanted to be "accepted," and expressed her belief that Libberton would not have committed the crimes against Maya had he been alone. (*Id.* at *60.) Libberton's mother recounted Libberton's love-hate relationship with his father, opining that Libberton suffered emotionally due to his father's uncaring attitude toward him. *Id.* at 60.

Libberton's sister similarly indicated that Libberton "was easily influenced by others," "would do anything to [be] accepted by others," and "follow[ed] others." (*Id.*) Libberton's sister also explained that their father's "rejection" profoundly impacted the children in the family and recounted an incident in

which Libberton's father beat Libberton and his brother "very badly."

Libberton's childhood friend likewise described Libberton as a "follower." (*Id.* at *61.) Libberton's friend also noted that Libberton's father "never showed [Libberton] any affection," thought Libberton was "worthless," had a "violent temper," and "was extremely impatient and impossible to believe. He was very critical of everyone around him." *Id.*

The same judge who sentenced Libberton to death considered this "new" information, but found that it did not give rise to a colorable claim for post-conviction relief, primarily because "[h]aving presided at the trial of this case, this court is of the opinion that nothing defendant has raised in his current petition for post-conviction relief would have affected the outcome of trial or the sentencing." (Pet. App. 3, at 1-2.)

The district court, in rejecting Libberton's ineffective assistance claim agreed with the state court's assessment of the significance of this new information:

> The Court finds that even if counsel was deficient in not presenting testimony from these individuals at the mitigation hearing, [Libberton] cannot establish prejudice. Much of the information offered in the affidavits[2] of [Libberton's] mother, sister, and childhood friend—in particular, their characterization of his stormy relationship with his father, his

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[2] Libberton presented updated affidavits to the district court, which the district court references here.

substance abuse, and his tendency to be [a] follower—was similar to testimony presented at the mitigation hearing by defense witnesses Henry and Smith. The only "new" information is a statement that [Libberton's] father had been physically violent with him and the fact that in the year before the crimes [Libberton] was experiencing headaches and his sister and mother noticed a change in his behavior. The allegation of physical violence does not add substantively to the information before the trial court concerning [Libberton's] troubled relationship with his father. Regarding [Libberton's] headaches, he was examined by two medical doctors prior to trial and found to have no major mental illnesses; moreover, evidence of his impulsive behavior traits was already before the court by way of the affidavits of Drs. Dee and Bindelglas. The Court acknowledges that [Libberton's] mother, sister, and childhood friend were closer to [Libberton] and knew him better than Henry or Smith, and that additional testimony from these individuals would not have harmed his case. However, when weighed against the evidence presented at trial and the facts as recounted in the PSR, the Court believes that the cumulative nature of their testimony would have had limited impact

The evidence presented at trial showed [Libberton] planned this crime with James over a period of several hours, then executed the plan in a particularly cruel and cold-blooded manner. Evidence further shows the murder was motivated by pecuniary gain as well as a desire

> to obtain transportation so [Libberton] could escape from serving a jail sentence. There is not a reasonable probability that testimony from [Libberton's] mother, sister, and friend—essentially character evidence similar to testimony presented at the mitigation hearing—would have resulted in a different sentence. For the above reasons, the PCR court's denial of relief was not objectively unreasonable in light of the principles outlined in *Strickland*.

(Pet. App. B at *61 (footnote omitted).)

The Ninth Circuit's reversal of the district court ruling eviscerates AEDPA deference. The Ninth Circuit's failure to defer to the state post-conviction court's factual determinations is especially troubling given that the judge who presided over Libberton's post-conviction proceedings was the same judge who sentenced Libberton. *See Schriro v. Landrigan*, 550 U.S. 465, 476 (2007) ("it is worth noting, again, that the judge presiding on postconviction review was ideally situated to make this assessment [determination of the facts] because she is the same judge that sentenced Landrigan and discussed these issues with him."); *Smith v. Stewart*, 140 F.3d 1263, 1271 (9th Cir. 1998) (stating that when the judge who presided at the PCR proceeding was also the sentencing judge, the court "would be considerably less inclined to order relief" for that might approach "a looking-glass exercise in folly").

This failure to defer is not an isolated incident. *See Robinson v. Schriro*, __ F.3d __, 2010 WL 597358 at *24-25 (9th Cir. 2010) (J. Rawlinson, dissenting). (objecting to granting relief because the Ninth Circuit "do[es] not have to try and determine whether the asserted deficiencies would have made a difference in the sentence imposed" because "[a]fter

hearing all this evidence, the post-conviction review judge, who was also the sentencing judge, determined that the evidence presented would not have affected the sentence imposed."). *See also Pinholster*, 590 F.3d at 685 (Kozinski, J., dissenting) (listing cases in which Ninth Circuit has failed to defer to state court rulings). This Court should grant review to correct the Ninth Circuit's repeated failure to grant AEDPA deference in capital cases.

The Ninth Circuit's reliance on evidence that was not presented to the state courts is improper and unpersuasive. The Ninth Circuit cites in particular an affidavit from Daniel McIntosh, who provides an opinion that James was a leader and Libberton a follower in the Maya murder. Reliance on this affidavit was improper because Libberton never proffered an explanation for why he could not have presented it to the state court at the time he presented other affidavits considered by the court. *See* 28 U.S.C. § 2254(d)(2) (state court determination reviewed for reasonableness "in light of the evidence presented at the state court proceeding"); *see also Holland v. Jackson*, 542 U.S. 649, 652-53 (2004) (whether a state court's decision was unreasonable must be assessed in light of the record the court had before it; record should not be expanded absent a showing of diligence in attempting to develop claim in state court); *Williams*, 529 U.S. at 440 (concluding he petitioner met the burden of showing he was diligent in efforts to develop the facts supporting certain claims).

Furthermore, even if the McIntosh affidavit were properly before the court, it merely provided evidence that was essentially cumulative to that found wanting by the state court.

The Ninth Circuit explained the significance of the McIntosh affidavit as follows:

> Dan McIntosh could have further corroborated James's role as the leader and Libberton's role as a follower. McIntosh explained in an affidavit that "James borrowed [the] gun from a man who lived nearby" because "[h]e was upset because his girlfriend had moved out to live with two black men." He also recalled that James once showed him "Polaroid photographs of gallows he had built," and that "he had hung his dog from the gallows." After being arrested James "telephoned [McIntosh] and threatened to kill [him] and [his] family if [he] testified against" James.

Id.

The Ninth Circuit ignored, however, the fact that, although there is additional information about co-defendant James' character and his propensity to violence on other occasions, that information is of marginal relevance to the instant case, particularly given that Libberton had already presented evidence regarding James' bad character and his role as the ringleader in the Maya murder. Evidence that James was violent would have been cumulative to the extent it would have been offered to posit that James was the leader and Libberton the follower in murdering Maya. Such cumulative evidence does not provide a basis for granting federal habeas relief. *See Bobby v. Van Hook*, 130 S. Ct. 13, 16-17 (2009).

B. The Ninth Circuit Essentially Rewrote the Strickland Prejudice Prong By Granting Relief Without Considering the Facts and Circumstances of the Crime, the Death-Qualifying Aggravating Circumstances, and Relevant Arizona Law.

Although the Ninth Circuit initially recognized that "the prejudice inquiry requires us to 'reweigh the evidence in aggravation against the totality of available mitigating evidence,'" *Libberton*, 583 F.3d at 1169 (citing *Wiggins v. Smith*, 539 U.S510 (2003), the Ninth Circuit did not conduct such an analysis and merely found "that the failure to find and present the evidence was prejudicial," *Libberton*, 583 F.3d at 1171-73, and that there is a "reasonable probability that had the above-described evidence been presented to the sentencing judge, he would have imposed a lesser sentence." *Id.* at 1173. By simply examining mitigation evidence, the Ninth Circuit essentially presumed prejudice without conducting the required reweighing of the evidence, which is contrary to this Court's jurisprudence.

In *Wiggins*, this Court reaffirmed that, except in rare cases,[3] it is the defendant's burden to prove prejudice:

> In order for counsel's performance to constitute a Sixth Amendment violation, petitioner must show that counsel's failures prejudiced his defense. *Strickland*, 466 U.S. at 692, 104 S. Ct. 2052. In *Strickland*, we made clear that, to establish prejudice, a "defendant must show that there is a reasonable probability that, but for

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[3] In the context of the Sixth Amendment right to effective counsel, this Court presumes prejudice in two limited circumstances, neither of which is present here: (1) where there is a complete denial of the right to counsel; and (2) where counsel labors under an actual conflict of interest. *Strickland*, 466 U.S. at 692 (citing *United States v. Cronic*, 466 U.S. 648, 659, & n.25 (1984); and *Cuyler v. Sullivan*, 466 U.S. 335, 345-50 (1980)).

> counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694, 104 S. Ct. 2052.

539 U.S. at 534.

In its analysis leading to its finding that Libberton proved prejudice, the Ninth Circuit failed to even mention, much less consider, the facts and circumstances of Libberton's crimes. This is contrary to this Court's jurisprudence. *See Strickland*, 466 U.S. at 695 ("[A] court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury."); *see also Van Hook*, 130 S. Ct. at 18–20 (after discussing the mitigation evidence, this Court turns to "the other side of the scale[]" and examines the aggravating circumstances found at trial, ultimately concluding that the Sixth Circuit gave the aggravating factors "short shrift, leading it to overstate further the effect additional mitigating evidence might have had."). Indeed, *Strickland* requires that "the reviewing court [] consider all the evidence—the good and the bad—when evaluating prejudice," *Belmontes*, 130 S. Ct. at 390, which the Ninth Circuit failed to do here.

The panel's error here was especially egregious given the deliberation involved in committing the crime, the duration of the crime, and the sheer cruelty of Maya's murder. Even assuming Libberton was a follower, he did not simply follow someone else's lead. Instead, he personally held the victim at gunpoint during a two-hour drive and actively participated in a brutal murder that was anything but spontaneous.

Moreover, the Ninth Circuit compounded its error by failing to consider the two death-qualifying aggravating factors found by the Arizona Supreme Court: (1) the murder was committed in the expectation of pecuniary gain; and (2) the

murder was committed in an especially heinous, cruel or depraved manner. *Id. See, e.g., Strickland*, 466 U.S. at 700 ("Given the overwhelming aggravating factors, there is no reasonable probability that the omitted evidence would have changed the conclusion that the aggravating circumstances outweighed the mitigating circumstances and, hence, the sentence imposed.").

The Ninth Circuit also failed to consider Arizona law in making its finding of prejudice. Once again, this is contrary to this Court's jurisprudence. *See Strickland*, 466 U.S. at 694–95 ("The assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision."). The alleged omitted mitigation that the panel found so compelling—James's leadership role in Maya's murder compared to Libberton's lesser role and Libberton's abusive childhood—would likely be afforded little mitigating weight under Arizona jurisprudence. *See State v. Clabourne*, 983 P.2d 748, 755, ¶ 29 (Ariz. 1999) (holding that planning and major participation weigh against age and immaturity as mitigating circumstance); *State v. Hoskins*, 14 P.3d 997, ¶ 103 (Ariz. 2000) ("The fact defendant was fully capable of conceiving and pre-determining a criminal plan and carrying it out in the face of every opportunity to choose a better course is a relevant consideration. Had the murder been committed on the spur of the moment, impulsively, or in a quick lapse of judgment, mitigation based on age would deserve more weight, but that was not the case."); *State v. Williams*, 904 P.2d 437, 454 (Ariz. 1995) (age given no weight in mitigation when actions were "quite deliberate" instead of "impulsive"); *State v. Walton*, 769 P.2d 1017, 1035 (Ariz. 1989) (carrying out a crime over a significant period of time shows relative maturity and minimizes the weight of young age as a mitigating factor). Additionally, Arizona sentencers typically afford little

mitigating weight to evidence of a dysfunctional or abusive childhood. *See, e.g., State v. Jackson*, 918 P.2d 1038, 1049 (Ariz. 1996) ("We are well aware that children who are emotionally and physically abused are adversely affected to some extent for the rest of their lives. Our criminal dockets are filled with such people. But we have never reduced a defendant's death sentence on such a basis.").

This Court should grant certiorari review because the Ninth Circuit has repeatedly failed to accord deference under AEDPA and because this case is a particularly egregious example of that failure to defer. This is not a case in which defense counsel failed to present compelling mental health evidence or any other compelling information that might have changed the sentencing decision. The Ninth Circuit has thus reversed a capital case based solely on evidence that Libberton was a "follower" and had an abusive relationship with his father, even though that type of evidence was presented at sentencing and even though the post-conviction judge (who was also the sentencer) found that this type of additional evidence would not have changed the sentencing decision. Such a result is contrary to *Strickland* and eviscerates the prejudice prong of the *Strickland* analysis.

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CONCLUSION

For these reasons, Petitioner respectfully requests that this Court grant its petition for writ of certiorari and reverse the Ninth Circuit's ruling with respect to sentencing.

Respectfully submitted

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